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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARCIAL BAHENA TORRES, Defendant and Appellant.	G051227 (Super. Ct. No. 09NF1395) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney and Thomas A. Glazier, Judges. Conditionally reversed with directions.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Tami Falkenstein Hennick, Deputy AttorneyS General, for Plaintiff and Respondent.

* * *

A jury convicted Marcial BahenaTorres (born June 1962) of aggravated sexual assault of a child under 14 years old (Pen. Code, §§ 269, subd. (a)(4), 288a, subd. (c)(2) [count 1]; all statutory citations are to the Penal Code unless noted), forcible lewd acts on a child under 14 years of age (§ 288, subd. (b)(1) [count 2]), and false imprisonment by violence (§§ 236, 237, subd. (a) [count 3].) The jury also found Torres engaged in substantial sexual conduct with a child under age 14 (§ 1203.066, subds. (a)(8), (b) [as to count 2]), and engaged in tying and binding of the victim (former § 667.61, subds. (b), (e)(6) [as to count 2] [version eff. Nov. 8, 2006 to Sept. 8, 2010]). Torres contends the trial court violated his federal constitutional rights to confront and cross-examine witnesses by allowing the prosecution to prove the results of DNA testing through the testimony of a "case manager" rather than the analysts who conducted facets of the testing procedures. He also argues the trial court abused its discretion by declining to conduct an in camera review of the victim's school records. We find no merit to Torres's federal constitutional claim, but agree he made a sufficient showing to obtain an in camera review of the confidential records. We therefore conditionally reverse the judgment for the trial court to review the records in camera and determine whether to reinstate the judgment or order a new trial.

I

FACTUAL AND PROCEDURAL BACKGROUND

Torres lived with M.Z. and M.Z.'s 13-year-old daughter D.O. in Anaheim. On May 13, 2009, Torres agreed to pick up D.O. from school and then get M.Z. from her brother's home in Riverside. Torres later phoned M.Z., confirmed he had D.O. with him, but he never arrived in Riverside to pick up M.Z. The brother drove M.Z. to Anaheim and they found D.O. home alone. After dinner, D.O. began crying and disclosed Torres had orally copulated her after binding her hands and feet, and covering her face. M.Z. called the police. M.Z. later discovered Torres's clothing was missing from the bedroom closet.

D.O. testified that after she and Torres returned from school, she went to the bedroom to do homework. Torres entered the bedroom, grabbed her, threw her on the floor, and straddled her. She kicked and screamed at him to let her go. He tied her hands behind her back, put duct tape over her mouth, and told her to be quiet. He picked her up and put her on the bed. The tape came off D.O.'s mouth and she screamed again. He put a blanket over her face and sat on her, making it difficult for her to breathe. He removed her jeans and underwear, forced her legs apart, and began kissing and licking her vagina. When he finished about five minutes later, he untied her, took off the tape, told her not to tell anyone, and departed.

A travel agency employee, Jesus Rodriguez, testified Torres called the day before the incident to ask about flights to Acapulco, Mexico, explaining he wanted to leave as soon as he sold his truck. The next day, Torres came in around noon to tell Rodriguez he wanted a plane ticket for that day because his father was ill. Torres telephoned later, stating he would buy a ticket at the Tijuana Airport, and asked about transportation. Rodriguez agreed to drive him to the airport for $60. Torres telephoned again and asked if he could leave his belongings with Rodriguez because he could not leave them at his apartment. Torres arrived between 3:00 and 3:30 p.m. and left his suitcase in Rodriguez's vehicle. Rodriguez drove Torres to the airport around 7:30 that evening.

A forensic nurse conducted a sexual assault exam on D.O. at an Anaheim hospital more than eight hours after the assault. She observed redness on D.O.'s external genitals and swabbed D.O.'s vaginal area for DNA.

Nearly four years later, in April 2013, an Anaheim officer obtained a DNA swab from Torres. Heather Pevney, a forensic scientist with the Orange County Crime Lab, testified the swabs from D.O.'s vestibule and vulva contained low levels of amylase, which is found in saliva and other bodily fluids, but there was no detectable foreign

DNA. D.O. could not be excluded as the contributor of female DNA found on the adhesive side of duct tape collected at the scene.

Putinier conducted "Y-STR" typing of the DNA. This determines the presence or absence of the Y chromosome, which is found only in male DNA. Putinier found male DNA in the vulvular sample with the same haplotype profile as Torres's. The profile occurs in fewer than 1 in 6,667 individuals.

Defense

Torres testified and denied committing any of the acts that D.O. described. He decided to return to his wife in Mexico for health and financial reasons, explaining his father was ill and needed assistance. M.Z. became angry when he told her about his intentions in 2008. D.O. overheard the couple's conversations.

On the day of the incident, he drove D.O. to school, went to a job, and then spoke with a potential buyer for his truck. He notarized a DMV document at the travel agency. D.O. took the bus home from school and was annoyed Torres did not pick her up. He packed his suitcase and used duct tape to secure loose socks. When D.O. saw him packing, she pulled items out of his suitcase, and when he put them back in, she took them out again. He became angry and slapped her twice on the back.

Torres dropped off his suitcase with Rodriguez, delivered the truck to the purchaser, who drove him back to the travel agency, and Rodriguez later drove him to the airport. He phoned M.Z. from Rodriguez's office, told her D.O. was home alone, and he was leaving for Mexico. A week later in Mexico he learned about the allegations. He telephoned Anaheim police and advised a detective he was not returning to the United States because he had no documents and was taking care of his diabetes. Torres described his relationship with D.O. as very good. She was obedient and a good student.

Following trial in November 2014, a jury convicted Torres of the charges and found the special allegations to be true. In December 2014, the court imposed a

sentence of 15 years to life for aggravated sexual assault, and stayed (§ 654) terms for the other offenses.

II

DISCUSSION

A. *DNA Testimony Did Not Violate Confrontation Clause*

The prosecution moved in limine to admit DNA testimony through a case manager. The moving papers stated the crime lab employed a "batch processing" testing protocol where an assigned case manager oversees and participates in the analysis and ultimate interpretation of the data, but other trained and qualified analysts may perform other steps in the processing of evidentiary items. At the final stage, the case manager, who may have been involved in other steps, analyzes the data and forms an opinion whether DNA matches a particular person.

Pevney testified she was the "case manager" for the testing done in Torres's case. Pevney examined the evidence and wrote the report, but did not conduct the extraction, amplification, and typing of the DNA from the samples. Other qualified analysts completed aspects of this process. The crime lab's protocol required its analysts to use specified methods and procedures for testing DNA and these procedures were generally accepted within the scientific community. Pevney reviewed the records associated with each step of the procedures used in Torres's case and determined the protocol had been followed.

Pevney stated she received swabs from Anaheim police corresponding to D.O.'s body parts. She tested the vestibule, vulva, and breast swabs for amylase, which is found at high levels in saliva and lower levels in other body fluids. The vestibule and vulva swabs contained a low level of amylase. She conducted DNA testing on the swabs and found female DNA matching D.O. but no foreign DNA. According to Pevney, the vaginal area is rich in cellular material, most of the vaginal cellular material will show only female DNA because there is lower chance of detecting whether male DNA is

present. She therefore submitted the samples for Y-STR typing, which looks for the presence of male DNA ignoring the female DNA and amplifying the male DNA present.

Putinier testified concerning the Y-STR (short tandem repeat) DNA testing. The protocols are identical to standard DNA testing, although the number of cycles during the amplification process are different. Putinier used DNA extracts previously prepared by Pevney from the swabs, including Torres's buccal swab. Putinier prepared and amplified the samples using a kit targeting Y chromosomes, performed the capillary electrophoresis, and obtained Y haplotypes. To illustrate her testimony, she prepared a table showing the typing results from the swabs and Torres's standard, the loci tested, and frequency estimates. The haplotypes found on the vulva swab and Torres's sample were identical. Putinier estimated the haplotype is "more rare than 1 in 6667 random individuals."

Torres contends the trial court violated his rights to confrontation and cross-examination guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution when only two of the six analysts testified. Torres made a different argument at trial, however. Opposing the prosecutor's pretrial motion to admit the DNA analysis, Torres noted Pevney had concluded there was no foreign DNA on D.O.'s vulva and submitted a request for "Y filer test" using Torres's DNA. Counsel argued this testing produced a written "formalized" document that was "testimonial in nature" and admission would violate Torres's rights under the confrontation clause under *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 (*Melendez-Diaz*). The trial court overruled Torres's objection, explaining the test results were "not sworn or certified" to and therefore not "testimonial" and would be admissible. But as it turned out, Putinier testified to her conclusions concerning the Y-STR test. Consequently, Torres's concern the prosecution would not admit through Pevney a written formal document from Putinier never materialized.

The Sixth Amendment provides in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." "[G]enerally the Sixth Amendment's confrontation right bars the admission at trial of a testimonial out-of-court statement against a criminal defendant unless the maker of the statement is unavailable to testify at trial and the defendant had a prior opportunity for cross-examination." (*People v. Lopez* (2012) 55 Cal.4th 569, 580-581 (*Lopez*).) Both the United States Supreme Court and our Supreme Court have grappled with the application of this principle to the context of scientific testing and expert testimony. (See *Williams v. Illinois* (2012) 567 U.S. 647 [affirming conviction where expert testified about the results of DNA tests she did not personally conduct as the basis of her opinion the defendant's DNA was present is swabs taken from the rape victim]; *Bullcoming v. New Mexico* (2011) 564 U.S. __ [confrontation clause does not permit the prosecution to introduce the blood alcohol findings of a nontestifying forensic analyst recorded in a signed formal written certificate through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the certificate]; *Melendez-Diaz, supra,* 557 U.S. 305 [violation of confrontation when written certificates, executed under oath, stating a drug test revealed the presence of cocaine admitted without the testimony of the scientist who performed the test]; *People v. Dungo* (2012) 55 Cal.4th 608 [factual observations in the autopsy report were not testimonial]; *Lopez, supra,* 55 Cal.4th 569 [nontestifying analyst's laboratory report not made with the requisite degree of formality or solemnity to be considered testimonial under the Sixth Amendment].)

Here, the issue is whether Pevney or Putinier relayed testimonial statements from fellow crime lab workers in violation of the confrontation clause or, alternatively, provided admissible expert testimony about the results of nontestimonial DNA testing. "To be considered testimonial, the out-of-court statement (1) must have been made with some degree of formality or solemnity and (2) must have a primary purpose that pertains

in some fashion to a criminal prosecution." (*People v. Barba* (2013) 215 Cal.App.4th 712, 720-721 (*Barba*); see *People v. Holmes* (2012) 212 Cal.App.4th 431, 438 (*Holmes*) ["It is now settled in California that a statement is not testimonial unless both criteria are met"].)

Applying this framework, it does not necessarily violate the confrontation clause for expert witnesses who have supervised but not performed the underlying laboratory work to testify about the results of DNA testing. (*Holmes, supra,* 212 Cal.App.4th at pp. 433-434.) The testifying witnesses in *Holmes* "referred to notes, DNA profiles, tables of results, typed summary sheets, and laboratory results that were prepared by nontestifying analysts." (*Id*. at p. 434.) "None of these documents was executed under oath. None was admitted into evidence. Each was marked for identification and most were displayed during testimony. Each of the experts reached his or her own conclusions based, at least in part, upon the data and profiles generated by other analysts." (*Ibid*.) The *Holmes* court concluded the test data and reports were not sufficiently solemn or formal to qualify as testimonial because they consisted of "unsworn, uncertified records of objective fact." (*Id*. at p. 438.) Though the court noted the data and reports were generated for the primary purpose of a criminal prosecution, this alone was not enough to render the DNA test data testimonial. (*Id*. at p. 438; see also *Barba, supra,* 215 Cal.App.4th at pp. 741-743 [DNA report relied on by testifying expert in forming opinions not testimonial because it both lacked the necessary formality or solemnity, and because its primary purpose did not pertain to a criminal prosecution].)

Here, Pevney and Putinier testified to their own conclusions based on data generated by other analysts. No formal documents from the nontestifying technicians were admitted into evidence. "Unsworn statements that 'merely record objective facts' are not sufficiently formal to be testimonial." (*Holmes, supra,* 212 Cal.App.4th at p. 438.) "So long as a qualified expert who is subject to cross-examination conveys an independent opinion about the test results, then evidence about the DNA tests themselves

is admissible." (*Barba, supra,* 215 Cal.App.4th at p. 742.) "Defendant cites no authority that testimony concerning raw data, by an expert subject to cross-examination, violates the confrontation clause." (*People v. Steppe* (2013) 213 Cal.App.4th 1116, 1126 [rejecting confrontation clause challenge to expert testimony regarding DNA testing].) Because we reject Torres's assertion of confrontation clause error on the first prong of the analysis, we need not address whether the primary purpose of some or all of the DNA testing pertained to a criminal prosecution.[1]

B. *The Trial Court Abused Its Discretion By Failing to Review D.O.'s School Records*

Torres contends the trial court erred in declining to review in camera D.O.'s school records provided to the court under a subpoena duces tecum. We agree the trial court erred and remand the matter for the court to conduct an in camera review of the pertinent records.

Before trial, the defense subpoenaed, and the trial court received, D.O.'s school records from the Anaheim City School District (ACSD). Defense counsel filed a motion and a declaration under seal requesting the court review the records in camera and release material evidence to the defense. The subpoena and school records are not part of the appellate record.

Counsel's declaration asserted on information and belief that D.O. talked to school staff and other children about her allegations Torres sexually abused her. Counsel also declared that Torres told police investigators he was innocent and D.O.'s mother, M.Z., was upset with Torres because he returned to Mexico without providing financial support for M.Z. and D.O. The trial court denied the motion for an in camera review of the records.

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[1] Torres argues the California Supreme Court cases (*Lopez* and *Dungo*) conflict with *Bullcoming* and *Melendez-Diaz.* We are bound by California Supreme Court authority interpreting and applying those decisions, however. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

"Documents and records in the possession of nonparty witnesses and government agencies other than agents or employees of the prosecutor are obtainable by subpoena duces tecum." (*People v. Superior Court* (*Barrett*) (2000) 80 Cal.App.4th 1305, 1318.) In a criminal action, "[t]he issuance of a subpoena duces tecum pursuant to section 1326 of the Penal Code . . . is purely a ministerial act and does not constitute legal process in the sense that it entitles the person on whose behalf it is issued to obtain access to the records described therein[,] until a judicial determination has been made that the person is legally entitled to receive them." (*People v. Blair* (1979) 25 Cal.3d 640, 651].) In criminal cases, the trial court is charged with determining whether there is good cause to disclose confidential records. (*Kling v. Superior Court* (2010) 50 Cal.4th 1068, 1074-1075.)

The parties do not cite specific statutory or decisional authority for the showing required to trigger a trial court's duty to examine subpoenaed school records in camera. In *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81-82 (*City of Santa Cruz*), the court noted a motion to obtain trial court review of confidential peace officer personnel records (Evid. Code, §§ 1043-1045; §§ 832.7-832.8) requires an affidavit showing good cause for the discovery or disclosure setting forth the materiality to the subject matter involved in the pending litigation. (*City of Santa Cruz*, *supra*, at p. 82.) The court noted, "[A] criminal defendant's right to discovery is based on the 'fundamental proposition that [an accused] is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information.' [Citation.] . . . "[A]n accused . . . may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial.' [Citation.] . . . [T]he requisite showing in a criminal matter 'may be satisfied by general allegations which establish some cause for discovery' other than a mere desire for all information in the possession of the prosecution. [Citation.] The information sought must, however, be 'requested with adequate specificity to preclude the possibility that defendant is engaging

in a 'fishing expedition.'" (*Id.* at pp. 84-85.) The affidavit or declaration does not require personal knowledge of the material facts and may be on information and belief. (*Id.* at p. 89 [affidavits on information and belief allowed where the facts are difficult or impossible to establish; if party already had the particulars of the records he would not need to discover the records].)

To satisfy the specific factual requirement, the defendant need only present an account "that is plausible when read in light of the pertinent documents [police reports, written statements, etc.]." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1025 (*Warrick*).) A plausible scenario "is one that might or could have occurred," and need not be corroborated. (*Id.* at p. 1026; *Eulloqui v. Superior Court* (2010) 181 Cal.App.4th 1055, 1064.) The court must not weigh or assess the evidence. (*Ibid.*) Thus, the proffered scenario need not be "persuasive," "reasonably probable" or even "credible." (*People v. Thompson* (2006) 141 Cal.App.4th 1312, 1316-1318.) In sum, the good cause showing is a "'relatively low threshold'" for obtaining an in camera review of the records. (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 70.)

Here, Torres denied the specific allegations and proclaimed his innocence to investigators, explaining he believed M.Z., D.O.'s mother, prompted her daughter to make the allegations because Torres returned to Mexico to reunite with his wife. Torres alleged on information and belief D.O. discussed the charges with school staff and other school children. Torres did not have to show his claim of innocence was credible or believable, merely that his scenario "could have occurred." (*Warrick, supra*, 35 Cal.4th at p. 1026.) Based on the foregoing, Torres presented a plausible scenario for an in camera review of D.O.'s school records.

Torres's remedy "is not an outright reversal, but a conditional reversal with directions to review the requested documents in chambers on remand." (*People v. Gaines* (2009) 46 Cal.4th 172, 180.) After reviewing the confidential records in chambers, the trial court may reinstate the judgment if it determines the records contain

no relevant information. (*Id*. at p. 181.) If the court uncovers relevant information it must order disclosure and allow Torres an opportunity to show prejudice. (*Ibid*.) The court must order a new trial if Torres shows a reasonable probability the result would have been different had the information been disclosed. (*Id*. at p. 182)

III

DISPOSITION

The judgment is conditionally reversed and the cause remanded to permit the trial court to conduct an in camera review of the subpoenaed school records. If the trial court's inspection on remand reveals no relevant information, the trial court shall reinstate the judgment of conviction and sentence. If the inspection reveals relevant information, the trial court must order disclosure, allow Torres an opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

THOMPSON, J.